

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

_____	X	
THE NEW YORK TIMES COMPANY	:	
and CAITLIN H. DICKERSON,	:	
	:	
Plaintiffs,	:	<u>COMPLAINT</u>
- against -	:	
	:	
CUSTOMS AND BORDER PROTECTION,	:	
	:	
Defendant.	:	
_____	X	

Plaintiffs THE NEW YORK TIMES COMPANY and CAITLIN H. DICKERSON
(collectively, “The Times”), by their undersigned attorneys, allege as follows:

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to obtain an order for the production of agency records from Customs and Border Protection (“CBP”) in response to a request properly made by Plaintiffs (jointly, “The Times”).

PARTIES

2. Plaintiff The New York Times Company publishes *The New York Times* newspaper and www.nytimes.com. The New York Times Company is headquartered in this judicial district at 620 Eighth Avenue, New York, New York.

3. Plaintiff Caitlin H. Dickerson is a reporter for *The New York Times* newspaper.

4. Defendant CBP is an agency of the federal government that has possession and control of the records that Plaintiffs seek.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

6. Venue is premised on the place of business of Plaintiffs and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

7. Plaintiffs have exhausted all administrative remedies available in regard to the request at issue. *See* U.S.C. § 552(a)(6)(C).

FACTS

8. In 2017, CBP's El Paso sector became the first in the country to begin conducting widespread family separations, piloting the "zero tolerance" policy that was later introduced nationwide.

9. On August 5, 2019, The Times submitted two FOIA requests to CBP via FOIAonline.

10. The first request ("El Paso Request") sought "access to and copies of the following records: All emails, printed documents and fliers, internal and external memos and reports distributed between May of 2017 and May 2018 to OFO officers, OFO supervisors, Border Patrol agents and/or Border Patrol supervisors in the El Paso sector that include any of the following terms: 'famu,' 'famua,' 'unaccompanied alien child,' 'uac,' 'pilot,' 'family separations,' 'family unit separations,' 'family unit parent,' 'family separation determinations,' 'family unit AND prosecutions,' and/or 'zero tolerance.'" The Times sought expedited processing of the Request and requested that CBP provide a reasonably estimated date of completion pursuant to 5 U.S.C. § 552(a)(7)(B)(ii).

11. The second request (“Nationwide Request”) sought “access to and copies of the following records: All emails, printed documents and fliers, internal and external memos and reports distributed to employees and supervisors of CBP and/or Border Patrol between May 2017 and the date of the agency’s search that include any of the following terms: ‘famu,’ ‘famua,’ ‘unaccompanied alien child,’ ‘uac,’ ‘pilot,’ ‘family separations,’ ‘family unit separations,’ ‘family unit parent,’ ‘family separation determinations,’ ‘family unit AND prosecutions,’ and/or ‘zero tolerance.’” The Times sought expedited processing of the Request and requested that CBP provide a reasonably estimated date of completion pursuant to 5 U.S.C. § 552(a)(7)(B)(ii).

12. On August 5, 2019, The Times received automated responses from admin@foiaonline.gov, confirming that both the El Paso Request (Tracking Number: CBP-2019-073508) and the Nationwide Request (Tracking Number: CBP-2019-073511) were properly submitted.

13. On August 6, 2019, The Times received an e-mail response from CBP, acknowledging receipt of the El Paso Request “received on 08/05/2019 requesting all emails, printed documents, fliers, internal and external memos and reports distributed to OFO Officers, OFO Supervisors, Border Patrol Agents and/or Border Patrol supervisors in the El Paso sector from May 1, 2017 through May 31, 2018.” That same day, The Times received three additional notifications regarding the El Paso Request. First, The Times received a notification stating that the tracking number for the request was changed from CBP-2019-073508 to CBP-OIT-2019-073508 and explaining that a change in tracking number “is normally due to the request being transferred to another agency . . . or to a sub-agency to process it.” Second, The Times received a notification stating that its request for a fee waiver was fully granted. Finally, The Times

received a notification that its request for expedited processing was denied. The denial stated, confusingly: “Expedited Processing Disposition Reason: Does meet requirements per DHS Regulations.”

14. Also on August 6, 2019, the Times received an e-mail with a letter attachment stating that the Nationwide Request, CBP-2019-073511 “has been closed as it is a duplicate of an earlier FOIA request that you submitted.” The letter further explained: “Your earlier FOIA request CBP-20173511 will be processed in the order it was received. All CBP and Border Patrol entities will be searched.”

15. In effect, CBP acknowledged that it has not made a timely response to the Nationwide Request, which was first filed in 2017.

16. As of the date of this filing, The Times has not received any records in response to the FOIA requests at issue.

COUNT I

17. Plaintiffs repeat, reallege, and reincorporate the allegations in the foregoing paragraphs as though fully set forth herein.

18. CBP is an agency subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any other materials as to which it is claiming an exemption.

19. Plaintiffs have exhausted all administrative remedies under FOIA as to the EL Paso Request, because CBP failed to make a determination in regard to either the Request within 20 business days.

20. Accordingly, Plaintiffs are entitled to an order compelling CBP to produce records responsive to the El Paso Request (CBP-2019-073508).

21. Plaintiffs have exhausted all administrative remedies under FOIA as to the Nationwide Request, because CBP closed that request (CBP-2019-073511) and the 2017 request (CBP-20173511), of which it is purportedly a duplicate, has yet to be processed, according to the agency's own August 6, 2019 letter.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

22. Declare that the documents sought by the El Paso Request (CBP-2019-073508) and the Nationwide Request (CBP-2019-073511), as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

23. Order CBP to undertake an adequate search for the records requested in the El Paso Request and the Nationwide Request and provide those records to Plaintiffs within 20 business days of the Court's order;

24. Award Plaintiffs the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and

25. Grant Plaintiffs such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 27, 2019

/s/ David E. McCraw
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